

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VIVENDI S.A.,

Plaintiff,

v.

T-MOBILE USA, INC., T-MOBILE
DEUTSCHLAND GMBH, T-MOBILE
INTERNATIONAL AG, DEUTSCHE
TELEKOM AG, and ZYGMUNT SOLORZ-
ZAK,

Defendants.

No. CV6-1524 JLR

**DECLARATION OF ULI
KUEHBACHER IN SUPPORT
OF MOTION TO DISMISS THE
SECOND AMENDED
COMPLAINT**

I, ULI KUEHBACHER, hereby declare as follows:

1. I am Executive Vice President of Deutsche Telekom AG ("Deutsche Telekom") and, until December 2006, I was General Counsel for T-Mobile International AG. I am also a member of the Supervisory Board of Polska Telefonia Cyfrowa Sp. z o.o. ("PTC"). I submit this declaration in support of the Motion of Deutsche Telekom, T-Mobile Deutschland GmbH, T-Mobile International AG, and T-Mobile USA, Inc. (the "DT Defendants") to Dismiss the Second Amended Complaint. This declaration is based on my personal knowledge or on information that I have obtained for the purpose of preparing this declaration.

1 2. I am familiar with the organizational structure and business activities of
2 Deutsche Telekom and its subsidiaries—including the DT Defendants—and have knowledge
3 of the dispute surrounding ownership of certain shares in the Polish telecommunications
4 company, PTC, that is the basis of this lawsuit. I am also familiar with the allegations that
5 Vivendi S.A. (“Vivendi”) makes in its Second Amended Complaint.
6

7 **I. THE DT DEFENDANTS’ ORGANIZATIONAL STRUCTURE**

8 3. Deutsche Telekom, T-Mobile International AG, and T-Mobile Deutschland
9 GmbH (the “German DT Defendants”) are all organized under the laws of Germany with their
10 principal places of business in Germany. The German DT Defendants are all separate
11 corporate entities that maintain separate books and records.

12 4. Deutsche Telekom is the parent company of a group of corporate entities,
13 including the other DT Defendants. Deutsche Telekom owns subsidiaries that provide fixed-
14 line and mobile telecommunications services.
15

16 5. T-Mobile International AG is the general partner of T-Mobile International AG
17 & Co. KG which is a holding company for the subsidiaries of Deutsche Telekom that provide
18 mobile telecommunications services. T-Mobile International AG is wholly owned by T-
19 Mobile International Holding GmbH. T-Mobile International Holding GmbH is a holding
20 company that is in turn wholly owned by Deutsche Telekom and that is organized under the
21 laws of Germany with its principal place of business in Germany.
22

23 6. T-Mobile International Holding GmbH owns all but one share of T-Mobile
24 International AG & Co. KG, which is also organized under the laws of Germany with its
25 principal place of business in Germany. T-Mobile International AG owns one share of T-
26 Mobile International AG & Co. KG.
27

1 7. T-Mobile International AG & Co. KG wholly owns T-Mobile Deutschland
2 GmbH, which was previously known as DeTe Mobil Deutsche Telekom Mobilnet GmbH. T-
3 Mobile International AG & Co. KG also wholly owns T-Mobile Global Holding GmbH,
4 which is organized under the laws of Germany with its principal place of business in
5 Germany.

6 8. T-Mobile Global Holding GmbH wholly owns T-Mobile USA.

7 9. T-Mobile Deutschland GmbH provides mobile telecommunications services in
8 Germany. T-Mobile Deutschland GmbH and T-Mobile USA are affiliates and do not have a
9 parent-subsidiary relationship.
10

11 10. T-Mobile USA does not hold any stock or other interest in PTC.

12 **II. GERMAN DT DEFENDANTS' CONTACTS WITH WASHINGTON STATE**
13 **AND THE UNITED STATES**

14 11. To my knowledge, none of the German DT Defendants is incorporated or
15 registered to do business in the State of Washington, or any other U.S. State.

16 12. To my knowledge, none of the German DT Defendants owns or rents any
17 property in the State of Washington, or any other U.S. State.

18 13. To my knowledge, the German DT Defendants do not sell their
19 telecommunications products or services in the State of Washington, or any U.S. State.

20 14. To my knowledge, the German DT Defendants do not advertise their
21 telecommunications products or services in the State of Washington, or any U.S. State.

22 **III. THE GERMAN DT DEFENDANTS' RELATIONSHIP WITH T-MOBILE USA**

23 15. Like each of the German DT Defendants, T-Mobile USA is a separate
24 corporate entity. To my knowledge, T-Mobile USA and the German DT Defendants do not
25 hold joint boards of directors' meetings, and they file separate tax returns.
26
27

1 16. While certain members of the German DT Defendants' boards of directors
2 (called "supervisory boards") sit on T-Mobile USA's board, they do so as T-Mobile USA
3 directors and not as representatives of the German DT Defendants.

4 17. T-Mobile USA operates a separate wireless telecommunications network from
5 that of the German DT Defendants. The wireless devices sold by the German DT Defendants
6 and T-Mobile USA operate using a Global System of Mobile Communications ("GSM")
7 technology platform. European and U.S. GSM frequencies are different, however, and thus
8 the GSM networks on which the German DT Defendants' and T-Mobile USA's products and
9 services operate are separate and distinct.
10

11 **IV. LITIGATION CONCERNING THE DISPUTED PTC SHARES**

12 18. Over the last eight years, Vivendi, Elektrim S.A. ("Elektrim"), Telco (a joint
13 venture between Vivendi and Elektrim), and Deutsche Telekom (and certain of its German
14 subsidiaries) have been involved in numerous arbitral and national court proceedings in
15 Europe concerning the ownership of certain shares in PTC originally held by Elektrim. These
16 proceedings have taken place in Poland, Austria, France, Germany, the United Kingdom, and
17 Switzerland. Many of these proceedings are still ongoing.
18

19 19. As described in paragraph 57 of the Second Amended Complaint, on
20 November 26, 2004, an arbitral tribunal in Vienna, Austria issued an award finding, among
21 other things, that the attempted transfer by Elektrim of its shares in PTC to Telco was
22 ineffective and that Elektrim remained the owner of the disputed shares at all material times
23 ("the November 2004 Award").
24
25
26
27

1 **A. Proceedings in Poland**

2 20. On or about December 16, 2004, Elektrim filed an action in Poland seeking
3 recognition of the November 2004 Award. On February 2, 2005, the Warsaw Regional Court
4 issued a decision recognizing the November 2004 Award. An English translation of that
5 decision is attached hereto as Exhibit A.

6 21. Telco appealed the Warsaw Regional Court's decision to the Appellate Court
7 in Warsaw, 1st Civil Division. On March 29, 2006, the Appellate Court dismissed the appeal.
8 An English translation of the Appellate Court's decision is attached hereto as Exhibit B.

9 22. Telco appealed the court of appeals's decision to the Supreme Court of Poland.
10 On January 18, 2007, the Polish Supreme Court vacated the lower-court decisions confirming
11 the November 2004 Award on procedural grounds. The Supreme Court remanded the case to
12 the Warsaw Regional Court where the recognition proceedings have now recommenced. An
13 English translation of the Supreme Court decision is attached as Exhibit C.

14 23. In addition to the recognition proceedings related to the November 2004
15 Award, Vivendi and Telco have also filed more than a dozen legal proceedings in Poland
16 relating to the PTC dispute. Some, but not all, of the actions that Vivendi and Telco have
17 filed in Poland are described below.

18 a. Following the November 2004 Award, Telco filed suit in Warsaw
19 Regional Court seeking a declaration that it was the owner of the PTC shares. During
20 those proceedings, Telco made an *ex parte* application requesting that PTC be
21 enjoined from making any changes to PTC's internal share register. An English
22 translation of Telco's Request for Interim Measures in that action is attached hereto as
23 Exhibit D.

1 b. On June 20, 2006, after the Warsaw Regional Court issued the *ex parte*
2 injunction, the Warsaw Appellate Court reversed, holding that the November 2004
3 Award barred Telco's claim to the shares. An English translation of the Appellate
4 Court's decision is attached hereto as Exhibit E.

5 c. Vivendi (or Telco) has also initiated many additional proceedings in
6 Poland, including, but not limited to, proceedings: to declare invalid T-Mobile
7 Deutschland GmbH's acquisition of the PTC shares; to list Telco as the owner of the
8 disputed PTC shares in the National Court Register, the official Polish registry of
9 shareholders; to prohibit PTC from distributing profits; to prohibit Elektrim's
10 representatives on the PTC Management and Supervisory Boards from acting on
11 behalf of PTC; to prohibit T-Mobile Deutschland GmbH and Elektrim from exercising
12 shareholder rights with regard to the disputed PTC shares; to restrain Elektrim from
13 transferring or taking any action with regard to the disputed shares; to order Elektrim
14 to return the PTC shares or their value to Telco; for damages against PTC Supervisory
15 Board and Management Board members and PTC shareholders; and to prohibit
16 Elektrim from transferring funds to its creditors.

17 **B. Proceedings in Austria**

18 24. Vivendi, through Telco, sought to annul the November 2004 Award in Austria.
19
20 On December 20, 2005, the Commercial Court in Vienna partially annulled the November
21 2004 Award. On October 10, 2006, the Higher Regional Court of Vienna reversed the
22 Commercial Court's partial annulment and dismissed Telco's action. Telco was ordered to
23 pay the costs and attorney's fees of the other parties to the appeal proceedings, including T-
24
25
26
27

1 Mobile Deutschland GmbH. An English translation of this decision is attached hereto as
2 Exhibit F.

3 25. On December 18, 2006, the Austrian Supreme Court issued a decision
4 affirming the appellate court's dismissal of the annulment action and order for Telco to pay
5 costs and attorney's fees. An English translation of the Supreme Court's decision is attached
6 hereto as Exhibit G.

7
8 **C. Proceedings in France**

9 26. On or about April 26, 2005, Vivendi served Deutsche Telekom and T-Mobile
10 International AG & Co. KG with a civil summons to appear before the Commercial Court of
11 Paris. An English translation of the Summons is attached hereto as Exhibit H.

12 27. Vivendi alleges that the defendants violated French law by breaking off
13 settlement talks in 2003 and 2004 in bad faith and colluding with Elektrim. Among other
14 things, Vivendi seeks damages in the amount of its alleged investment in PTC (1,881,601,161
15 euros). An English translation of Vivendi's brief submitted to the French court is attached
16 hereto as Exhibit I.

17
18 **D. Proceedings in Germany**

19 28. Vivendi filed suit in Hamburg, Germany, requesting that the court prohibit
20 Deutsche Telekom from making any statements to the effect that it owns the PTC shares. The
21 Hamburg Regional Court rejected Vivendi's claim in a decision dated November 7, 2006. An
22 English translation of that decision is attached hereto as Exhibit J.

23
24 **E. Proceedings in Switzerland**

25 29. In April 2006, Vivendi commenced another arbitration, this time before the
26 International Court of Arbitration of the International Chamber of Commerce in a proceeding
27

1 sited in Geneva, Switzerland. The respondents in that arbitration are, among others, Deutsche
2 Telekom, T-Mobile International AG & Co. KG, T-Mobile Deutschland GmbH, Elektrim,
3 and PTC. In the Swiss arbitration, Vivendi claims to be the owner of the disputed PTC shares
4 based on a purported oral agreement. Vivendi seeks specific performance of that agreement
5 and/or damages. Again, Vivendi claims that it is entitled to regain the disputed PTC shares or
6 its lost investment, as it does in this suit.
7

8 **V. LOCATION OF RELEVANT DOCUMENTS AND WITNESSES**

9 30. To my knowledge, the DT Defendants' documents and witnesses relevant to
10 this lawsuit, which I understand accuses the DT Defendants of violating U.S. law during and
11 after the Second and Third Vienna Arbitrations (as defined in Vivendi's complaint), are
12 located outside the United States.

13 31. To my knowledge, all of the documents possessed by any DT Defendant that
14 are relevant to discussions with Vivendi to settle the PTC dispute are located in Germany and
15 Poland. To my knowledge, no such documents would be located in the United States because
16 T-Mobile USA had no involvement in the settlement discussions that form the basis of this
17 lawsuit.
18

19 32. To my knowledge, all of the documents possessed by any DT Defendant that
20 are relevant to the Second and Third Vienna Arbitrations are located in Germany and Poland.
21 To my knowledge, no such documents would be located in the United States because T-
22 Mobile USA had no involvement in the Second or Third Vienna Arbitrations or any of the
23 legal proceedings regarding ownership of the PTC shares.
24

25 33. To my knowledge, all of the documents possessed by any DT Defendant that
26 would concern Elektrim or Mr. Solorz Zak, if they existed, would be located in Germany and
27

1 Poland. To my knowledge, no such documents would be located in the United States because
2 T-Mobile USA had no involvement in the PTC dispute.

3 34. To my knowledge, all of the documents possessed by any DT Defendant
4 regarding the three press releases that Vivendi alleges in this lawsuit were unlawful would be
5 in Germany, where the press releases were drafted and released.
6

7 35. To my knowledge, all of the witnesses likely to have knowledge of any
8 settlement communications with Vivendi, the Second and Third Vienna Arbitrations,
9 communications with Elektrim or Solorz, and the press releases identified by Vivendi in its
10 complaint would be located in Germany, Poland, or elsewhere in Europe, but not in the
11 United States.

12 36. If this case were to be tried before this Court, the DT Defendants' witnesses
13 would need to travel to Seattle from Germany, Poland and elsewhere in Europe.
14

15 37. I understand that Vivendi bases its complaint in part on communications
16 allegedly made by Mr. Peter Golob to representatives of Vivendi. Mr. Golob was never, and
17 is not now, an employee of any of the DT Defendants, though he has acted as an independent
18 consultant in the past. To my knowledge, he currently resides in London, England.

19 38. I understand that Vivendi also bases its complaint in part on a communication
20 allegedly made by Mr. Thomas Winkler, former CFO of T-Mobile International AG, to
21 representatives of Vivendi. As of January 31, 2007, Mr. Winkler is no longer the CFO of T-
22 Mobile International AG. To my knowledge, he currently resides in Bonn, Germany.
23

24 I declare under penalty of perjury under the laws of the United States that the
25 foregoing is true and correct.
26
27

EXECUTED this 16 day of May, 2007.



Uli Kuehbacher

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2007, I filed this Declaration of Uli Kuehbacher in Support of Motion to Dismiss the Second Amended Complaint on the CM/ECF system, which will send notification of such filing to the following persons:

Robert E. Rohde: brohde@rohdelaw.com

Lanny J. Davis: ldavis@orrick.com

Garrett Rasmussen: grasmussen@orrick.com

DATED this 17th day of May, 2007.

Davis Wright Tremaine LLP
Attorneys for Defendants

By /s/ Stephen M. Rummage
Stephen M. Rummage, WSBA #11168
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
Telephone: (206) 628-7513
Fax: (206) 628-7699
E-mail: steverummage@dwt.com